BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The petition for a writ of certiorari to the Court of Appeal of Louisiana, First District, was denied by the Supreme Court of the State of Louisiana March 3, 1941 (R. 45).

The opinion of the Court of Appeal of Louisiana, First District, was rendered December 12, 1940 (R. 38-44).

The opinion of the Trial Court, the Twenty-seventh Judicial District Court, St. Landry, Louisiana, is printed in the Record at pages 25-35, inclusive.

Jurisdiction.

The judgment of the Court of Appeal of Louisiana, First Circuit, here sought to be reviewed, was entered December 12, 1940 (R. 38-44). Application for rehearing was denied January 14, 1941 (R. 44). Petition for a writ of certiorari was duly filed in the Supreme Court of the State of Louisiana and was denied by that court March 3, 1941 (R. 45).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344 (b); Rule 38, Sup. Ct. U. S.).

Statement.

The principal facts are set forth in the petition, *supra*, pp. 1-2.

Specifications of Error.

It is submitted that the Court of Appeal of Louisiana, First Circuit, erred:

1. In affirming the judgment of the Twenty-seventh Judicial District Court, St. Landry, Louisiana, and misconstruing and misinterpreting applicable decisions of this Court.

2. In permitting parol evidence as to the ownership of the goods and the initial carrier's knowledge of such ownership to contradict and modify the terms of the bill of lading contracts.

3. In refusing to hold that the bills of lading constituted the controlling contract and that all parol or prior understandings were merged in the written contracts of shipment.

4. In holding that a carrier, by its subsequent conduct, may release a shipper or consignor from his express obligation to pay the lawful transportation charges on an interstate shipment.

5. In holding that the consignor of a shipment who is not the owner of the goods (of which fact the carrier had knowledge) but who has expressly assumed the primary obligation to pay the lawful transportation charges, becomes only secondarily liable, if liable at all, when the consignee, as owner, accepts and receives the shipments from the carrier or directs their delivery to another.

6. In holding that the consignor could be only secondarily liable under the circumstances cited in paragraph 5 and that his liability was contingent upon the carrier exhausting all means of collecting the lawful charges from the consignee's nominee as well as from the original consignee.

Statutes Involved.

The statute involved is the Interstate Commerce Act of February 4, 1887, as amended, particularly Sections 1, 2, 6 and 20 (11), 49 U. S. C. A., Sections 1, 2, 6 and 20 (11).

ARGUMENT.

I.

The consignor is primarily liable for the freight charges.

Aside from the requirements of the bills of lading here involved, the consignor is primarily liable for the payment of freight charges. In *L. & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 67, the court said:

> "Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer."

Moreover, it has been generally held that a consignor is liable for freight charges even though he may not be the owner of the goods. *Portland Flouring Mills Co.* v. *British & F. M. Ins. Co.*, 103 Fed. 860, 864.

In *L. & N. R. Co.* v. *Central Iron & Coal Co., supra*, this Court went on to point out that the parties are left free to contract as to the liability for freight charges, saying at page 66 of the opinion:

> "The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were left free to contract, subject to the rule which prohibits discrimination."

Therefore, when determining what liability has been assumed for the payment of the freight charges, resort must

be had to the contract. Thus in the cited case, the Court said, at page 67:

> "We must, therefore, determine what promise, if any, to pay freight charges was, in fact, made by the Central Company.
>
> "To ascertain what contract was entered into we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract."

The provision with respect to the payment of the transportation charges as it is set forth in the bills of lading under which the present shipments moved is contained in Section 7 thereof, the applicable portion of which reads:

> "Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. *The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges* and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor * * * shall not be liable for such charges. * * *." (R. 24A-24D). (Italics supplied.)

On the face of the bills of lading, the following was printed:

> "Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

"The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges" (R. 24A-24D).

The consignor (respondent here and defendant below) signed the bills of lading, but did not sign the non-recourse statements thereon (R. 24A-24D).

The bill of lading provision specifically making the consignor liable for freight charges was approved by the Interstate Commerce Commission in *In The Matter of Bills of Lading,* 52 I. C. C. 671, 721, decided April 14, 1919.

II.

The bills of lading are the sole evidence of the agreement of the parties.

The bills of lading are written contracts and constitute the agreement between the parties. Their terms can not be altered or varied by parol evidence. All prior negotiations are merged into the written agreement. This has been expressly so held in *Portland Flouring Mills Co.* v. *British & F. M. Ins. Co., supra,* where the Court said, at page 863:

"In the present case the intention of the parties was clearly expressed in the bill of lading. There was nothing of an equivocal or ambiguous character contained therein, and there were no words used which required any oral testimony as to their true meaning. In all such cases it is manifest that 'the rights of the parties are fixed by the bill of lading, and the evidence of conversations prior to the date of it cannot have any effect to vary its provisions.' O'Rourke *v.* 221 Tons of Coal (D. C.) 1 Fed. 619, 624. 'The carrying contract, reduced to writing in a bill of lading, can no more be altered or varied by parol evidence than any other written contract.' The Golden Rule (C. C.) 9 Fed. 334. 'Such a contract is to be construed, like all other written contracts, according to

> the legal import of its terms. It becomes the sole evidence of the undertaking, and all outstanding agreements are extinguished by the writing.' Louisville, E. & St. L. R. Co. *v.* Wilson (Ind. Sup.) 21 N. E. 343, 4 L. R. A. 244. See, also, Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.) 23 S. W. 299."

See also *Missouri-Pacific R. Co.* v. *Sorrell,* 21 F. Supp. 886, wherein the court said at page 888:

> "To hold that the express provisions of the bill of lading signed by the respective parties can, in the absence of a showing of fraud, be varied by evidence of prior or contemporaneous parol agreements would be to open the door to all of the attendant evils which the original parol evidence rule was intended to avoid. The hardship that may occasionally fall upon an individual shipper by reason of the enforcement of this rule will in no way offset the evil that would result from the complete relaxation of it asked by the defendant in this case. It is perfectly obvious under the decisions that the consignor or shipper, at the time of making the shipment, can thoroughly protect himself by incorporating a provision against liability in the written contract."

The parties to a contract of interstate shipment cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore such terms and hold the carrier to a different responsibility than that fixed by the agreement made under the published tariffs and regulations. *Georgia, Fla. & Ala. Ry.* v. *Blish Co.,* 241 U. S. 190.

Nor can an interstate carrier estop itself from enforcing payment from one who has assumed liability for the transportation charges. Thus at page 65 of its decision in *L. & N. R. Co.* v. *Central Iron & Coal Co., supra,* this court said:

> "No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor

could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

III.

The cases cited by the Court of Appeal of Louisiana fail to support its decision.

L. & N. R. Co. v. *Central Iron & Coal Co., supra,* is cited by the Court of Appeal as supporting its decision but, in fact, it upholds the contentions of petitioner. It is specifically stated in the *Central Iron & Coal Co.* case that in order "to ascertain what contract was entered into we look primarily to the bills of lading * * *." It is also stated therein that "there was no clause by which the shipper agrees expressly to pay the freight charges or to guarantee their payment." Since the movement of the shipments in the *Central Iron & Coal Co.* case, the provisions of the bill of lading have been changed so as to include an express provision making the consignor liable for the freight charges, but giving him a means of avoiding such liability if he so desires (see marginal note 3 at page 66 of the *Central Iron & Coal Co.* decision). This express provision was in the bills of lading covering the present shipments and respondent did not avail himself of the opportunity to escape such liability. There is this further important difference between the *Central Iron and Coal Co.* case and the instant case. The decision in the *Central Iron & Coal Co.* case discloses (p. 68) that the Central Iron & Coal Co. did not sign the bills of lading, "nor was it described therein as the consignor." Here respondent did sign the bills of lading in his own name as shipper.

Since the adoption of the uniform bill of lading containing the express contractual provision as to consignor liability, the courts have uniformly held that a consignor is

primarily liable for the freight charges unless he signs the non-recourse provision on the face of the bill of lading:

Atchison, T. & S. F. Ry. Co. v. *Hunt Bros. Fruit Co.*, 34 F. (2d) 582;

Pennsylvania R. Co. v. *Marcelleti*, 256 Mich. 411, 240 N. W. 4;

New York Central R. Co. v. *Frank H. Buck Co.*, 2 Cal. (2d) 384, 41 P. (2d) 547;

Pennsylvania-Reading Seashore Lines v. *Unit Const. Co.*, 117 N. J. L. 494, 189 A. 376 (N. J.);

New York, N. H. & H. R. Co. v. *California Fruit G. Exch.*, 125 Conn. 241, 5 A. (2d) 353;

N. Y. C. R. R. v. *J. B. Berry Sons' Co.*, 338 Pa. 500, 12 A. (2d) 588.

Yazoo & M. V. R. Co. v. *Zemurray*, 238 Fed. 789, and *St. Louis-San Francisco Ry. Co.* v. *Republic Box Co.*, 12 F. (2d) 441, are likewise relied upon by the State court. In both of these cases there was no express provision in the bills of lading, as here, that the consignor was liable for the transportation charges. Comment is made in *Missouri-Pacific R. Co.* v. *Sorrell, supra,* that such a provision was not in the shipping contracts in the *Central Iron & Coal Co.* case, and in the *Republic Box Co.* case.

It is respectfully submitted that the writ of certiorari should be issued, as prayed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 116.

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner,*

v.

PIERRE MISTROT.

ANSWER TO RESPONDENT'S REPLY BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

THE PENNSYLVANIA RAILROAD COMPANY,

By FREDERICK D. McKENNEY,
JOHN S. FLANNERY,
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ANSWER TO RESPONDENT'S REPLY BRIEF IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT.

PRELIMINARY STATEMENT.

The confusion of the issue created by respondent's reply brief makes this short answer essential.

This is not an action for the amounts of two dishonored checks, as respondent contends, but an action to recover from the respondent consignor transportation charges on two interstate shipments, pursuant to the provisions of the bills of lading, wherein the consignor became primarily

liable for such freight charges in the absence of his signature to the non-recourse provision of the bills of lading. (R. 1-10, 24A-24D)

I.

The Consignor is Primarily Liable for the Freight Charges.

Respondent admits, as contended by petitioner, that the consignor is primarily liable for the payment of freight charges, but states that a question of fact was presented in the Court of first instance as to whether respondent was "the consignor or shipper, or whether P. G. Sackenreuther, the owner of the cabbage shipped was the consignor." (Reply Brief, p. 4.)

Respondent having signed the original bills of lading in each instance as "shipper" or consignor (Test. R. 20, 24A-24D), no question was raised below as to whether or not respondent was the consignor. Respondent, however, did contend that he was not the *owner* of the produce shipped, but as set forth at page 7 of petitioner's original brief in support of the petition, the question of ownership is absolutely immaterial to the issue involved.

Respondent also lays great stress upon the written orders of P. G. Sackenreuther, the original consignee, directing the carrier to deliver the shipments to Tom Ayoob Company, the notify consignee, upon "payment of freight charges". This direction by the consignee could in no wise affect the primary responsibility of the consignor for the payment of the freight charges under the provisions of the bills of lading, which he signed. Moreover, it has been frequently held that such orders do not relieve even the consignee who gave them from the ultimate payment of the freight charges. *N. Y. Central R.R. Co.* v. *Warren Ross Lumber Co.*, 234 N. Y. 261, 137 N. E. 324, and *N. Y., N. H. & H. R.R. Co.* v. *California Fruit Growers Exchange*, 125 Conn. 241, 5 Atl. 2nd 353, and cases therein cited,—certiorari denied 308 U. S. 567. Respondent consignor was given the opportunity to protect himself against liability for the payment of freight charges by signing the non-recourse

clause on the face of the bills of lading, but he failed to take advantage of this protection afforded him and cannot now be heard to complain.

Interstate Commerce Commission's order misquoted.

Petitioner is accused of overlooking certain rules and regulations of the Interstate Commerce Commission respecting the collection of freight charges and respondent calls the Court's attention in the following language to a general order of the Commission dated January 20, 1931:

> "We respectfully call this Court's attention to the fact that the Interstate Commerce Commission's order in proceeding entitled 'Regulations for the Payment of Charges', 171 I. C. C. 268, provides:
>
> " 'Checks, drafts or money orders, WHICH ARE SATISFACTORY TO THE CARRIER, in payment of freight charges within the credit periods allowed such shipper, may be deemed to be the collection of tariff charges within the credit period for the purposes of these rules.' " (Reply Brief, 6-7)

Certainly no further reply to respondent's argument based upon this order need be made other than to point out that the paragraphs of the Commission's order immediately preceding the above quotation deal with the computation of the periods of credit which carriers may allow consignees for the payment of freight charges, and that the full sentence of the order referred to by respondent, correctly quoted, reads as follows:

> "The *mailing* by the shipper of *valid* checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purpose of these rules." (171 I. C. C. 268, 282, Italics supplied)

Respondent also places much emphasis upon the decision of this Court in *Fullerton Lumber Company* v. *Chicago, M., St. P. & P. R. Co.*, decided February 24, 1931, 282 U. S. 520, 51 Sup. Ct. 227, wherein this Court held that the carrier could not recover from the consignee where a *valid* check had been given by the consignee in payment of freight charges but was not collected when presented for payment after considerable delay on the part of the carrier because of the intervening failure of the bank on which the check was drawn.

The irrelevance of that case is obvious when it is recalled that in the instant case the carrier's suit is based upon the contracts of shipment against the consignor who was in no way connected with the *invalid* checks given to the carrier by the notify consignee. Respondent could certainly not seriously urge that the receipt of such invalid checks from the consignee, a co-obligor, would constitute "payment" of the freight charges and thereby destroy the primary obligation of the consignor to pay such charges under his contracts of shipment.

Respondent quotes the following paragraph from the Court's opinion in the *Fullerton Case:*

> "Whether, in the case at Bar, the defendant is liable depends, not upon any provision of the Interstate Commerce Act, but upon the rules of Law generally applicable to payment by check. These, and other questions which have been argued, need not be considered by us." (Reply Brief, p. 8)

Again, this quotation takes on an entirely different meaning when considered in the light of the sentence which immediately precedes it, reading as follows:

> "* * * There is no reason for denying to the parties the convenience and safety incident to making payment, in accordance with the prevailing usage of business, by means of a check payable on demand drawn on a going bank *in which the drawer has an ample deposit.*" (282 U. S. 520, 522, Italics supplied)

It should also be mentioned at this point that respondent purports to quote further from the opinion in the *Fullerton case* at pages 11-12 and 15 of his reply brief, as follows:

> "Carrier accepting check for freight charges held not relieved from loss resulting from delay in presenting check, by general requirement that carrier charges must be paid in money."

but no such statement is found in the Court's opinion.

II.

The Bills of Lading Are the Sole Evidence of the Agreement of the Parties.

Respondent admits "that bills of lading are written contracts and that their terms cannot be altered or varied by parole evidence, save and except where fraud or error induced by the agents of the plaintiff or by agreement in writing," (reply brief, p. 10) and no such fraud or error induced by the plaintiff or agreement in writing signed by the respondent is alleged or proved. This leaves respondent primarily liable for the payment of the freight charges pursuant to the unequivocal provisions of the bills of lading.

Chicago & E. I. R. Co. v. Collins Produce Company.

Respondent refers to this Court's opinion in *C. & E. I. R. Co.* v. *Collins Produce Company*, 249 U. S. 186, 39 Sup. Ct. Rep. 189, saying:

> "The Golden Rule for carriers is set forth by Justice Clarke in the case of the *Chicago and E. I. R. Co.* v. *Collins Produce Company*, 249 U. S. 186, 39 Sup. Ct. Rep. 189, as follows:
>
> " 'The relation of carrier to shipper so partakes of a fiduciary capacity as to require the utmost fairness on its part in dealing with the shipper and in the discharge of its duties to him; and the reason for this trust and confidence which must be sustained is based upon commercial necessity and public policy.' " (Reply brief, p. 10)

In that case, this Court held that a carrier could not successfully defend a suit by the shipper for failure to deliver certain perishable goods upon the ground that such failure was "caused by the act of God * * * or the authority of law", alleging that the produce had been appropriated by the military authorities in a flood area under martial law, where the fact was, as found by the jury, that the carrier had solicited the appropriation by the military authorities upon the false and unjustified representation that the fowls were abandoned by their caretaker and dying. Despite the complete lack of similarity between the two cases, respondent purports to set forth the "Golden Rule" prescribed for carriers in the *Chicago & E. I. R. Co. Case*, as above quoted, but the quotation is not found in the opinion.

III.

The Cases Cited by the Court of Appeal of Louisiana Fail to Support Its Decision.

Respondent strenuously urges that the Court of Appeal of Louisiana properly relied upon the decision of this Court in *L. & N. R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59. However, the very language of this Court's opinion in the *Central Iron & Coal Co.* case distinguishes that case from the one at bar. There the Court said:

> "In this case, the bills of lading acknowledge receipt of the coke from the Central Company. But *it did not sign them.* Nor was *it described therein as the consignor. There was no clause by which the shipper agrees expressly either to pay the freight charges or to guarantee their payment.* The goods received were not declared to be deliverable to the Central Company's order. On the contrary, the form of the bills of lading indicated that it was neither the owner nor the person on whose behalf the shipment was being made; and that Tutwiler & Brooks were either the owners or the persons in whose behalf the shipment was being made. On these facts, the trial court was justified in finding that the Central Company did not assume the primary obligation to pay the freight charges."

This Court thus clearly indicated that if the Central Company had signed the bill of lading as shipper or consignor and the bill of lading contained a clause by which the shipper expressly agreed to pay the freight charges, as in the instant case, the Central Company would have been primarily liable for the freight charges.

IV.

Federal Question Presented.

Respondent at page 16 of his reply brief quotes from *Southwestern Bell Telephone Company* v. *State of Oklahoma, et al.*, 303 U. S. 206, and urges that petitioner has failed to show that a Federal question was presented for decision to the Court below in this case.

This suit was brought to recover freight charges on interstate shipments and involves the interpretation of the uniform bill of lading used by rail carriers throughout the United States, which this Court has many times said presents a Federal question reviewable by this Court.

In *C., C., C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, this Court, in referring to a controversy arising under bills of lading, with particular reference to the limitation of liability provisions, said:

> "* * * But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry.* v. *Harriman*, 227 U. S. 657, 672; *Atchison &c. Ry.* v. *Robinson*, 233 U. S. 173, 180."

In *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327, this Court said:

> "We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act."

Again, in *Louisville & Nashville R.R. Co.* v. *Rice*, 247 U. S. 201, 203, this Court said:

> "* * * As to interstate shipments 'there can be no question that, since the decision in the *Croninger Case* [226 U. S. 491], the parties are held to the responsibilities imposed by the federal law, to the exclusion of all other rules of obligations.' *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592, 595; *Louisville & Nashville R.R. Co.* v. *Maxwell*, 237 U. S. 94, 97."

Despite the unequivocal allegation contained in plaintiff's petition in the District Court "that defendant made himself liable for the transportation charges on this freight shipment under Section 7 of the terms of the bill of lading contract," (R. 1, 2), the Louisiana Court of Appeal erroneously interpreted the provisions of the bills of lading involved in the instant case in a manner which if it remain the law of Louisiana, would give the consignors in that State a preference over the consignors in other states, and destroy the uniformity which the Interstate Commerce Act was designed to create and maintain.

It is again respectfully submitted that the writ of certiorari should be issued, as prayed.

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